

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

SHEILA G. COLVARD
(Claimant-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-361
Case No. 77-2723

S.S.A. No.

Office of Appeals No. F-2986 and F-3125

The claimant appealed from the decision of the Administrative Law Judge which held that the claimant had been overpaid benefits and was liable for the amount overpaid under section 1375 of the Unemployment Insurance Code.

STATEMENT OF FACTS

In connection with a benefit year for unemployment insurance effective May 30, 1976, the claimant claimed weekly benefits in the amount of \$104 for each of the five weeks ending September 11, 18, 25, and October 2 and 9, 1976. On October 29, 1976, the Employment Development Department issued two checks: No. F258243 in the amount of \$312 for the three-week period ending September 25, 1976 and No. F258244 in the amount of \$208 for the two-week period ending October 9, 1976. The weeks for which the payments were made were stated on the face of the checks. The checks were mailed to the claimant at an address in Orondo, Washington, where the claimant had been living.

On November 18, 1976 the claimant, who had moved to Modesto and reported her new address to the Modesto office of the Department, signed statements on Forms No. DE 731 that she had not received checks Nos. F258243 and F258244 for the five weeks beginning September 5, 1976 and ending October 9, 1976. On December 9, 1976 replacement of check No. F258244 in the amount of \$208 was authorized and sent to the claimant at her Modesto address on December 17, 1976. On December 23, 1976, replacement of check No. F258243 in the amount of \$312 was authorized and in addition replacement for check No. F258244 for \$208 was authorized a second time so that a check in the total amount

of \$520 (\$312 plus \$208) was sent to the claimant at her Modesto address on December 30, 1976. Both of these replacement checks stated on their face what checks they were in lieu of and for what weeks the benefits were being paid.

On or about December 1, 1976 the claimant received and cashed checks Nos. F258243 and F258244. The claimant cashed the replacement checks in the amount of \$208 and \$520 on or about December 23, 1976 and January 3, 1977, respectively; notices of overpayment for these amounts were issued by the Department on January 20, 1977 and February 4, 1977, respectively, for a total overpayment of \$728.

At the hearing upon the claimant's appeal, she testified that when she finally received the original checks in the mail from Washington, she reported this information by telephone to a representative of the Department and requested that processing of the replacement checks be stopped. The claimant further testified that when she received the replacement checks, she again telephoned the representative of the Department about the matter. According to the claimant, the representative checked the file and then informed the claimant the checks were hers and she should cash them. The claimant denied knowing that she was being paid twice and she testified that she did not inform the representative of the Department that the checks in question were marked to show they were in lieu of other checks.

The claimant had been claiming and receiving benefits at the Modesto office of the Department for some weeks subsequent to October 9, 1976 but she felt she had not received \$312 to which she was entitled for three additional weeks she had been in Washington. The evidence in the record before us deals only with the five weeks covered in the overpayment notices.

The claimant, who is an experienced grocery store checker, was still unemployed at the time of the hearing. She lived with her parents who were both employed.

The question before us for consideration is whether the claimant must be held liable for the overpayment or whether recovery may be waived under section 1375 of the code.

REASONS FOR DECISION

Section 1375 of the Unemployment Insurance Code provides as follows:

"Any person who is overpaid any amount as benefits under this part is liable for the amount overpaid unless:

(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and

(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience."

Whether the recovery of an overpayment may be waived under section 1375 of the code depends upon three tests. First, were the benefits overpaid by the Department because of fraud, misrepresentation or wilful nondisclosure on the part of the claimant (P-B-69). Second, was the overpayment received without fault on the part of the claimant. Third, provided that there was no fraud or fault on the part of the claimant, would compelling recovery of the overpayment violate the principles of equity and good conscience (Gilles v. Department of Human Resources Development (1974), 11 Cal. 3d 313, 113 Cal. Rptr. 374).

Fault is something less than fraud, misrepresentation, or wilful nondisclosure, and implies a degree of negligence or blame attributable to the recipient of erroneous payments such as failure to disclose to the Department facts which were known, or should have been known, to be material in determining eligibility for benefits.

In the present case no issue of fraud, misrepresentation or wilful nondisclosure on the part of the claimant has been raised. However, the evidence before us does present the question of whether the claimant was without fault in receiving the duplicate and triplicate benefits for several weeks due in part at least to Department error.

Here the four checks which were received and cashed by the claimant were each clearly marked to show the weeks for which the benefits were paid. Although the claimant denied knowing that she was being paid twice (three times for two of the weeks), she was concerned enough about the matter to seek assistance from the Department. When she sought such assistance, however, the claimant did not give full information to the Department that the last two checks were designated on their face as in lieu of the other two checks. The claimant as an experienced grocery store checker is not untrained in such matters. While the Department's actions were not entirely error free in this transaction, it is evident that it was largely the claimant's fault that caused the overpayment. It was her want of care or prudence in inquiring of the Department about the in lieu checks only by telephone and failing to provide significant details known to her concerning her entitlement to the checks which caused the overpayment.

Therefore, since the claimant was not without fault in the receipt of the \$728 overpayment, its recovery cannot be waived under the express language of section 1375 of the code and the claimant must be held liable for the overpayment. Whether the claimant was at any time entitled to an additional \$312 or any other sum for benefits claimed but not received for weeks she was in Washington or elsewhere subsequent to October 9, 1976 is not an issue before us for consideration. The claimant may raise that matter directly with the Department for consideration of a possible partial offset under section 1379 of the code.

DECISION

The decision of the Administrative Law Judge is affirmed. The claimant is liable for the overpayment in the total amount of \$728, subject to reduction for any offset to which she may otherwise be entitled.

Sacramento, California, June 14, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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